No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GREAT LAKES JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents four questions concerning Presidential Proclamation No. 9645, 82 Fed. Reg. 45,161, issued by the President on September 27, 2017: (1) Whether Respondents' challenge to the President's suspension of entry of aliens abroad is justiciable; (2) Whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad; (3) Whether the global injunction is impermissibly overbroad; and (4) Whether Proclamation No. 9645 violates the Establishment Clause? This *Amicus Curiae* brief addresses the last question.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE* 1

BACKGROUND 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. THE PRESIDENT'S PROCLAMATION BANNING CERTAIN TRAVELERS FROM NATIONS POSING A THREAT TO OUR NATIONAL SECURITY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE. 6

A. The Court Should Apply the Plain Meaning of the Words in the Establishment Clause to the President's Proclamation. 6

B. The Court Should Abandon the *Lemon* Test. 9

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Allegheny Co v. Greater Pittsburgh ACLU,
492 U.S. 573 (1989) 8, 17, 21, 22

Am Atheists, Inc v. Duncan,
616 F.3d 1145 (10th Cir 2010) 20

Capitol Square Review and Advisory Board v. Pinette,
515 U.S. 753 (1995) 10, 11

Edwards v. Aguillard,
482 U.S. 578 (1987) 19, 20

Epperson v. Arkansas,
393 U.S. 97 (1968) 19, 20

Gibbons v. Ogden,
9 Wheat. 1, 6 L.Ed. 23 (1824) 13

Hawaii v. Trump,
No. 17-17168 (9th Cir. Dec. 22, 2017) 4

Lee v. Weisman,
505 U.S. 577 (1992) 7, 9

Lemon v. Kurtzman,
403 U.S. 602 (1971) ..... *passim*

Lynch v. Donnelly,
465 U.S. 668 (1984) 17

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 13

Marsh v. Chambers,
463 U.S. 783 (1983) 7

McCreary County v. ACLU,
545 U.S. 844 (2005) 17, 20

McCulloch v. Maryland,
17 U.S. 316 (1819) 13

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 13

Obergefell v. Hodges,
135 S. Ct. 2071 (2015) 22

Santa Fe Independent School District v. Doe,
530 U.S. 290 (2000) 20, 21

State of Hawaii v. Trump,
1:17-cv-00050 (D. Hi. Oct. 17, 2017) 3

Van Orden v. Perry,
545 U.S. 677 (2005) 17

Wallace v. Jaffree,
472 U.S. 38 (1985) 10, 19, 20

CONSTITUTION

U.S. Const. amend. I 5, 6, 24

U.S. Const., art. I § 8, cls. 5, 7, 12 13

U.S. Const., art III, § 2 12

U.S. Const., art. V 14

STATUTES AND RULES

8 U.S.C. § 1101, *et seq.* 3, 4

Sup. Ct. R. 37 1

OTHER AUTHORITIES

Brief in Opposition, *Trump v. Hawaii*, No. 17-965 (2018) 4

Brief of Respondents, *Trump v. International Refugee Assistance Project*, 16-1436 (2017) 4

Executive Order No. 13780, "*Protecting the Nation from Foreign Entry into the United States*", 82 Fed. Reg. 13209 ..... 3, 4

Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) 2, 3

Georgia Seniors Told They Can't Pray Before Meals, ASSOCIATED PRESS, (May 10, 2010) 20

http://webstersdictionary1828.com/Dictionary/respecting 7

http://webstersdictionary1828.com/Dictionary/establishment 7

https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html 16

Oral Argument, as reported in the American Thinker, *available at* http://www.americanthinker.com/blog/2017/05/aclu_lawyer_admits_trump_ travel_ban_would_be_constitutional_if_hillary_issued_it.html#ixzz4o56hdFvM 16

M. W. McConnell, *Religion and its Relation to Limited Government*, 34 Harvard J. of Law and Pub. Pol. 943 (2010) 8

G. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. Rev. 535 (2004) 19

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, Great Lakes Justice Center, submits this brief.[1] *Amicus Curiae* is a non-profit 501(c)(3) organization that promotes principles of good governance under the Rule of Law. Most pertinent to the matter before this Court, *Amicus Curiae* supports the principle that elected officials, politically accountable to the citizenry, ought to promulgate public policy—not unelected members of the judiciary. *Amicus Curiae* cares deeply about the social and legal impact of politically-unaccountable judicial decisions that improperly usurp the legislative prerogative. This is especially so when unelected judicial bodies invalidate state action because the action was informed by a moral purpose.

Our lawyers' experience includes representing national religious organizations as *Amici Curiae* before this Court, as well as in the highest levels of government in other nations. Recently, we represented state and federal legislators as *Amici Curiae* encouraging this Court to: 1) look to the plain meaning of the words in the Establishment Clause; and 2) reverse *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

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[1] Petitioners granted blanket consent for the filing of *Amicus Curiae* in this matter. *Amicus Curiae* sought consent from Respondents, and received consent from the Respondents' counsel of record. *Amicus Curiae* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Great Lakes Justice Center, made a monetary contribution to the preparation or submission of this *Amicus Curiae* brief.

Amicus Curiae maintains that *Lemon* and its progeny extra-constitutionally permit changeable political preferences of unelected judges to substitute their politically unaccountable will for politically accountable governance.

Amicus Curiae works with legislative, executive, and judicial bodies, as well as with citizen groups, to further good governance practices. With experience in all three branches of government, *Amicus Curiae* understands the proper scope of the Article III judicial power and the proper role of the federal judiciary in our constitutional republic. From its experience, it holds special knowledge helpful to this Court about the importance of properly applying constitutional provisions, like the Establishment Clause, that limit the exercise of governmental power.

Amicus Curiae files this brief to encourage this Honorable Court to guide the American judiciary, and other branches of government, to return to a sound constitutional basis for state-church relations.

BACKGROUND

On September 27, 2017, the President of the United States promulgated the Proclamation now before this Court: "*Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats.*" Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017), Pet. App. 121a-148a.

A predecessor Executive Order required the Secretary of Homeland Security to determine whether foreign governments provide adequate information about individuals applying for U.S. visas, and then

report to the President. *See* Executive Order No. 13780, *"Protecting the Nation from Foreign Entry into the United States"* (hereinafter "EO"), 82 Fed. Reg. 13209. Several agencies of the government engaged in an extensive, global review process. The review process determined whether the United States could properly screen aliens seeking entry from foreign countries. Proclamation No. 9645. This examination ascertained whether foreign governments: 1) had adequate practices in place, and 2) provided sufficient information about individuals applying for U.S. visas. *Id.*

Upon completion of the global review process, and receiving the Acting Secretary's recommendation, the President of the United States issued the Proclamation. *Id.* The Proclamation suspended entry of certain foreign nationals from eight countries. *Id.*[2] According to the Proclamation, these countries fail to share adequate information with the United States to assess the risks posed by nationals from those countries, or they present other heightened risk factors. *Id.* The government reached this conclusion based on the global review process. *Id.*

The district court found that the Proclamation likely violated the Immigration and Nationality Act (INA), 8 U.S.C. § 1101, et seq. It, therefore, enjoined the government from enforcing the Proclamation, except as to aliens from two countries. *State of Hawaii v. Trump*, 1:17-cv-00050 (D. Hi. Oct. 17, 2017); Pet. App. 68a-69a; 70a-106a. The district court declined to reach the Plaintiffs' constitutional claims. *Id.*

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[2] The ban was subject to some exceptions and case-by-case waivers.

The court of appeals affirmed, concluding that the Proclamation likely violates the (INA), 8 U.S.C. § 1101, *et seq*. *Hawaii v. Trump*, No. 17-17168 (9th Cir. Dec. 22, 2017); Pet. App. 2a-65a.[3] Because the appellate court decided the case on statutory grounds, it did not reach the issue of whether the Proclamation violates the Establishment Clause. *Id.*

Those challenging the President's Proclamation (like those who challenged the predecessor EO[4]) contend, *inter alia*, that the travel ban violates the Establishment Clause because the President's purpose in issuing the Proclamation was not primarily secular. *See, e.g.*, Brief in Opposition, *Trump v. Hawaii*, No. 17-965 (2018).

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[3] Except as to individuals lacking a credible claim of a bona fide relationship with a person or entity in the United States.

[4] *See, e.g.*, Brief of Respondents, *Trump v. International Refugee Assistance Project*, 16-1436 (2017).

SUMMARY OF THE ARGUMENT

The President's Proclamation banning certain travelers, from nations posing a threat to our national security, does not violate the Establishment Clause. This Court should apply the plain meaning of the words in the Establishment Clause in its review of the President's Proclamation. The Establishment Clause simply prohibits federal laws "respecting an establishment of religion." U.S. Const. amend. I. The Proclamation does not establish a religion. It does not subject the American citizenry to governance under a theocracy. It does not coerce the American citizenry, by force of law and penalty, to practice an official religion. It does not, therefore, violate the Establishment Clause.

Amicus additionally urges this Court to reverse *Lemon v. Kurtzman*, 403 U.S. 602 (1971) because it unconstitutionally empowers unelected judges to supplant our politically accountable system of governance with their own protean preferences. *Lemon's* judicially contrived "secular purpose" policy: 1) exceeds the scope of judicial power stated in Article III of the Constitution; 2) bypasses constitutionally required, politically accountable processes for amending a Constitutional Rule of Law; 3) undermines the legitimacy of the judiciary; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of innumerable U.S. citizens.

ARGUMENT

I. THE PRESIDENT'S PROCLAMATION BANNING CERTAIN TRAVELERS FROM NATIONS POSING A THREAT TO OUR NATIONAL SECURITY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. Const. amend. I.

A. The Court Should Apply the Plain Meaning of the Words in the Establishment Clause to the President's Proclamation.

The Constitution is not just a set of guidelines. It is the framework on which the government and our legal system are constructed. Its words both create this Court's authority and give it definition. Those words were written quite clearly, by highly qualified draftsmen, to express a simple meaning. Faithful adherence to those words is the touchstone for measuring the fulfillment of this Court's sacred duty. Every Justice who takes the oath of office in the nation's highest Court swears to uphold the Constitution as it is written, not as he or she would like it to be written. Discerning and applying the meaning that the Drafters embodied in the Constitution's language is this Court's high calling.

Resolution of the issue before this Court requires a correct understanding of what the Establishment Clause means. This Court has long sought to honor this duty by understanding those meanings in their historical context. As Chief Justice Burger observed in

Marsh v. Chambers, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied...." 463 U.S. 783, 790 (1983). Reviewing the history of the Clause and its application, the *Marsh* Court held that a chaplain (employed by the government) did not violate the Establishment Clause by leading a legislature in prayer. *Id.* Similarly, in *Lee v. Weisman*, 505 U.S. 577, 631 (1992), Justice Scalia, joined by three other dissenting justices, stated that in this search for truth, "the meaning of the Clause is to be determined by reference to historical practices and understandings."

Webster's 1828 American Dictionary of the English Language defined *respecting* as: "[r]egarding; having regard to; relating to,"[5] and *establishment* as "[t]he act of establishing, founding, ratifying or ordaining."[6] Thus, the simple meaning of the Establishment Clause is that government should not shackle the consciences of the people, for whose sake it exists, through a state religion. The experience of our Founders, which the Establishment Clause reflects and seeks to save us from, was aptly delineated by Justice Scalia, dissenting in *Lee v. Weisman*, 505 U.S. 577, 640-41 (1992) (internal citations omitted; emphasis added):

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[5] (http://webstersdictionary1828.com/Dictionary/respecting, *last visited* Feb. 13, 2018).

[6] (http://webstersdictionary1828.com/Dictionary/establishment, *last visited* Feb. 13, 2018).

> The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

Numerous government policies supporting, acknowledging, and accommodating religion are considered time-honored practices that are a part of our nation's heritage. *See, e.g., Allegheny Co v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (Justice Kennedy, joined by Justices Rehnquist, Scalia, and White, dissenting). Properly understood, the "separation of church and state is not a limitation on churches or religion; it is a limit on the role of government with respect to churches and religious life in general." M. W. McConnell, *Religion and its Relation to Limited Government*, 34 Harvard J. of Law and Pub. Pol. 943, 944 (2010).

The President's national security Proclamation does not violate the Establishment Clause because it was not an action regarding or relating to the act of establishing or founding of a religion or state church.

The Proclamation does not subject the American citizenry to governance under a theocracy. Nor does it coerce the American citizenry, by force of law and penalty, to practice one official religion to the exclusion of all others. The President's action did not, therefore, violate the Establishment Clause.

B. The Court Should Abandon the *Lemon* Test.

This Court's "religion clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test." *Weisman*, 505 U.S. at 644 (Scalia, J., joined by three other Justices, dissenting). The test, often ignored but not yet overruled by this Court, regularly continues to receive "well-earned criticism." *Id.* at 644.

In *Lemon*, the Court replaced the test proscribed by the Constitution – whether government action "established" a religion – with a test of its own creation, whether government action had a secular purpose or "endorsed" religion. *Lemon v Kurtzman*, 403 U.S. 602, 612-13 (1971).

The Court contrived a three-part test, and then mandated that government action must satisfy all three elements to comport with the Establishment Clause:

> First, the [government action] must have a secular [] purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the

> [government action] must not foster an excessive government entanglement with religion.

Id. (internal citations omitted)

A few justices addressed the second prong of the *Lemon* test by requiring the government action to not even symbolically endorse religion. No agreement existed though, even among those justices, on how to decide when a government action symbolically endorsed religion.[7]

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[7] For example, Justice O'Connor, concurring in *Wallace v. Jaffree* stated:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. *** The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion].

472 U.S. 38, 76 (1985).

Elsewhere she likewise stated that: "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 773 (1995) (O'connor, J., concurring). Compare Justice O'Connor's measure with that of Justice Souter, who opined that he "attribute[s] these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis..., where I believe that such reasonable perceptions matter." *Id.* at 786. Likewise, Justice Stevens articulated a less informed "reasonable person" standard to determine whether an endorsement of religion exists when addressing the second prong in *Lemon*:

> If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for

The *Lemon* Court, in fashioning its test, ignored the plain meaning of the words in the Clause. When the Drafters wrote the Establishment Clause, they well knew the meanings of both "establish" and "endorse." They chose "establish" to express their intent. If they had meant "endorse," there is no doubt they would have chosen that word. It was wrong for the *Lemon* Court to alter the meaning of the Establishment Clause, and this Court should correct that error.

Remarkably, when determining the constitutionality of a government action under *Lemon*, the content of the government action is irrelevant. Instead, the *Lemon* test requires that a judge make a subjective assessment as to whether the government actor had a secular purpose (*i.e.*, the judge may indulge in relatively unconstrained speculation regarding another government official's state of mind, and subjectively conclude whether the government actor had a secular purpose). If the judge feels there was not a secular motive, the judge must hold that the government action violates the Establishment Clause.

Amicus Curiae urges this Court to reverse *Lemon v. Kurtzman* because it extra-constitutionally permits changeable political preferences of unelected judges to substitute their politically unaccountable will for the politically accountable governance guaranteed by the Constitution.

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that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.

Id. at 799.

As analyzed below, *Lemon's* "secular purpose" policy: 1) exceeds the scope of judicial power granted in Article III of the Constitution; 2) bypasses constitutionally required processes for amending the Constitution; 3) undermines the legitimacy of the judiciary; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous United States citizens.

Lemon's "secular purpose" test exceeds the scope of judicial power stated in Article III of the Constitution. In pertinent part, Article III of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.... (Section 1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.
> . . .

U.S. Const., art III, § 2.

The *Lemon* Court conspicuously failed to identify any legitimate source of constitutional authority on which it relied when amending the meaning of the Establishment Clause. The simple reason the *Lemon* Court failed to do so is that no enumerated judicial power exists for the judiciary to amend the constitutional law of the nation.

> The Federal Government "is acknowledged by all, to be one of enumerated powers." That is,

> rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers.
>
> . . .
>
> The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 404, 405 (1819)); U.S. Const., art. I § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 Wheat. 1, 194-95, 6 L.Ed. 23 (1824).

Nothing in Article III empowers the Court to change or "evolve" the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the Court to say instead what it prefers the law to be. 5 U.S. (1 Cranch) 137 (1803).

The *Lemon* Court, wandering far beyond the scope of its Article III powers, improperly permits changeable political preferences of unelected judges to amend a Constitutional Rule of Law (i.e., the Establishment Clause). Thus, *Lemon* amends "make no law respecting an establishment of religion" to instead require that "every government action must have a secular purpose" merely because a panel of unelected Justices preferred it so.

Moreover, in amending the meaning of the words in the Establishment Clause, *Lemon* bypassed constitutionally required political processes that specifically require involvement of politically-accountable state legislatures. Article V of the Constitution, in pertinent part, provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.
> . . .

U.S. Const., art. V.

Although the judicial branch may hold the power to say what the provisions of the Constitution mean, that power does not extend to amending or evolving the meaning of these provisions. That power is delegated to the politically accountable branches of government in Article V. Thus, when *Lemon* amended the meaning of the Establishment Clause, it usurped legislative authority in violation of Article V.

When a court steps beyond its limited duty and usurps legislative authority, as the Court did in *Lemon*, it undermines good governance under the Rule of Law and its own legitimacy. To test the provisions of a

government action against the Constitution is one thing; judicially imposing a new meaning on the words of the Constitution to achieve a judicially preferred outcome or social policy is another.

Those supporting *Lemon* wrongly see the Constitution as an evolving organism, the meaning of which they believe their office empowers them to actively manipulate. They become Platonic Philosopher Kings, ruling by judicial fiat, unbound by the constraints of the Constitution's actual language. *Lemon* embeds this tyrannical principle in our constitutional jurisprudence by allowing judges to make subjective, ad hoc assessments as to whether a government actor had a secular purpose or motive.

In this case, Respondents contend the President's action violates *Lemon's* distorted version of the Establishment Clause. They ask this Court to subjectively apply *Lemon's* judge-made doctrine that all government actions must have a secular purpose. In doing so, they ask this Court to ignore the content of the Proclamation and rely instead on religious references in Donald Trump's pre-election campaign speeches, to hold that the Proclamation violates the Establishment Clause.[8]

Lemon's subjective test makes a litigant's success in judge-shopping the best indicator of whether a law will

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[8] Contrary to the Respondents' unsupported suppositions, the President's Proclamation, issued after he was elected, survives even if it must face the judicially-manufactured *Lemon* test. This is because, *inter alia*, the President's purpose in issuing it was purely a secular one—preserving national security.

be struck down under the Establishment Clause. This Court should, therefore, overrule it.

If *Lemon's* judicially manufactured doctrine existed during the Lincoln Administration, the Emancipation Proclamation would be unconstitutional because Lincoln expressly invoked "the gracious favor of Almighty God" – not in a political speech during a Presidential campaign, but in the text of the proclamation itself.[9] Thus, when Judge Paul Niemeyer asked an ACLU lawyer whether the predecessor Executive Order travel ban would be constitutional if Presidential candidate Hillary Clinton had drafted the exact same Executive Order, the lawyer reluctantly, but truthfully, answered in the affirmative—revealing the absurdity of the doctrine and the potential for its abuse by a politically motivated judge or activist lawyer.[10]

The *Lemon* test also undermines predictability in the law, a vital component of good governance under the Rule of Law. When it comes to judicial review of government action and the Establishment Clause, the subjective nature of the *Lemon* test produces inconsistent judicial precedents. This inconsistency is inevitable because judges utilizing *Lemon* make a personal subjective assessment as to whether they

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[9] *Available at* (https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html, *last visited* Feb. 13, 2018).

[10] Oral Argument, as reported in the American Thinker, *available at* http://www.americanthinker.com/blog/2017/05/aclu_lawyer_admits_trump_travel_ban_would_be_constitutional_if_hillary_issued_it.html#ixzz4o56hdFvM, *last visited* Feb. 13, 2018.

happen to believe a government actor had a secular motive, rather than looking to the content of the government action itself. Inconsistent judicial precedents lead to unpredictability in the law. The inconsistent precedents produced by *Lemon's* subjectivist jurisprudence provide no useful guidance for government officials trying to act constitutionally. To illustrate, compare two Establishment Clause cases handed down by this Court on the same day: *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding government action placing Ten Commandments on government property as constitutional) and *McCreary County v. ACLU*, 545 U.S. 844 (2005) (striking down government action placing Ten Commandments on government property as unconstitutional). Four justices would have upheld both. Four justices would have struck down both. One justice upheld one and struck down the other -- applying *Lemon's* subjective standard, finding one symbolically endorsed religion and the other did not. *Compare also*, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding baby Jesus in a manger as constitutional) and *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (striking down baby Jesus in a manger as unconstitutional).

If *Lemon* says the Ten Commandments are both constitutional and unconstitutional; if *Lemon* says displaying baby Jesus in a manger is both constitutional and unconstitutional; if *Lemon* says Hillary Clinton issuing an EO is constitutional but President Trump issuing the same EO is not, then no predictability exists for those seeking to conform their conduct to the law. Predictability in the law is a necessary component of good governance under the Rule

of Law. *Lemon* replaces predictability in the law with the evolving political preferences of unelected judges.

Finally, *Lemon's* judicially contrived "secular purpose" test creates unjustifiable hostility toward the religious identity of numerous United States citizens. Many United States citizens seek guidance from their faith in formulating their public policy positions. Activist lawyers and politically motivated judges repeatedly use the *Lemon* doctrine to denigrate a person's religious identity. They do so by requiring religious people to substitute a purpose informed by their religious conscience for one founded on secular beliefs or traditions.

Requiring that every government action have a secular purpose, and not even symbolically endorse religion, is not only hostile toward a person's religious identity, it is an attempt to make that identity culturally, socially, and politically irrelevant. Proponents of this secular approach favor it because it enables judges to nullify unalienable rights. They assert that everyone can participate in important policy discussions except those whose identity is informed by religious viewpoints.

For example, in the State of Louisiana, Darwin's theory of evolution was taught in the government schools. Louisiana passed a law to also accommodate those with a different theory on the origin of the universe—creation science.[11] On its face, such an effort

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[11] The law prohibited the teaching of the theory of evolution in public schools unless accompanied by the instruction in creation science.

embodies the very essence of neutrality. The Court, however, reached an opposite conclusion in *Edwards v. Aguillard*, holding the law unconstitutional because it lacked a secular purpose and symbolically endorsed religious ideas. 482 U.S. 578, 583, 592 (1987).

According to *Lemon's* revisionist test, to be constitutionally "neutral", all laws and other government action must have a secular purpose and not even symbolically endorse religion.[12] Similarly, in *Epperson v. Arkansas*, the State of Arkansas passed a law regulating the teaching of evolution. 393 U.S. 97 (1968). The Court began its analysis by declaring that "[g]overnment in our democracy ... must be neutral ...." *Id.* at 103. The Court nevertheless proceeded to hold that because the law was motivated by a religious purpose, it violated the Establishment Clause.

Thus, although often couching its analysis in terms of neutrality, court decisions utilizing *Lemon* require secularly informed purposes while prohibiting religiously informed ones. Descriptive of such an analysis is Justice O'Connor's concurring opinion in *Wallace v. Jaffree*:

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws ... It reminds government that when it acts it should do so without endorsing a particular

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[12] For a scholarly discussion of how the neutrality principles demean religion in the United States, *see* G. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. Rev. 535, 566-72 (2004).

> religious belief or practice that all citizens do not share.

472 U.S. 38, 75-76 (1985).

It is apparently acceptable, and sufficiently neutral though, for government to dictate and endorse a secular belief or practice that all citizens do not share – even though the secular perspective necessarily implies a rejection of religious significance.

The implications of decisions like *Aguillard* and *Epperson* are immense. Mandating the irrelevance of religious identity and God enables judicial extermination of our unalienable liberty as viewed by the Framers.

Too many judges and other government authorities rely on *Lemon* to diminish religious identity and conscience. By way of example, senior citizens at a nursing home in Georgia were prohibited from praying before they ate their meal. The government said that because the meals were subsidized by the government, praying over the meal would be a violation of the Establishment Clause. *Georgia Seniors Told They Can't Pray Before Meals*, ASSOCIATED PRESS, (May 10, 2010).

Likewise, those whose actions are informed by the sacred rather than the secular have faced Establishment Clause challenges for erecting the Ten Commandments, *McCreary County v. ACLU*, 545 U.S. 844 (2005); raising memorials for the fallen, *Am Atheists, Inc v. Duncan*, 616 F.3d 1145 (10th Cir 2010); engaging in a moment of silence prior to starting school, *Wallace v. Jaffree*, 472 U.S. 38 (1985); praying prior to football games, *Santa Fe Independent School*

District v. Doe, 530 U.S. 290 (2000); and for displaying a manger scene at Christmas time. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

Several Justices on this Court have recognized how, contrary to the plain meaning of the Establishment Clause, *Lemon's* judicially contrived "secular purpose" test creates unjustifiable hostility toward the religious identity of innumerable United States citizens:

> Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage .... Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society [citation omitted]. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious ....
>
> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it m[illegible]not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

* * *

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.

Allegheny, 492 U.S. at 657-659 (Kennedy, J., joined by Rehnquist, Scalia, and White, J., dissenting). These Justices correctly recognized that *Lemon's* "view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents." *Id.* at 655.

For some legislators viewing the world through their religious identity, God and his Word are real, and therefore really matter. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015). It is part of who they are. They understandably oppose devolutionary social engineering that threatens the health, safety, and morals of the nation, as viewed through their religious identity. The government *Lemon* envisions must shape public policy informed by secular dogma, without regard to any religious conscience or moral considerations. In such a government, wisdom derived from religious tradition or individual conscience informed thereby has no place. Under our Constitution legislators should not have to choose between fidelity to their religious identity or participating in the policymaking process. The *Lemon* test demands that they do so, invalidating any policy they make that is informed by their religious identity. Thus, the *Lemon* test deprives people of faith of their dignity by telling

them that reliance on their faith while serving in government is unconstitutional.

Prohibiting a policy simply because it is informed by ancient sacred tenets prevents thousands of years of wisdom from informing the public ethic. The idea that God created humans in His image, and that all human life has dignity, ended slavery and advanced the rights of women around the world. Conversely, when government suppresses religious identity and the free expression of religious ideals, it often results in tragic consequences. Secularists such as Stalin murdered over 42 million people. Mao Zedong murdered over 37 million. Hitler murdered over 20 million. And the list of atrocities goes on and on where those in power selectively pick and choose which citizen's identities it will arbitrarily censure.

We are, therefore, in the midst of a high-stakes battle over the character of the American nation. The extent to which *Lemon's* "secular purpose" jurisprudence prevails over the view that the plain meaning of a constitutional provision governs will determine: 1) whether unalienable truth, as envisioned in the Declaration of Independence, will continue to be relevant as an objective limit on government action; and 2) whether the judiciary replaces the Framers' intent with its own personal social policy views.

Institutional integrity cannot exist without personal virtue. Good governance and civic institutional integrity rest on the virtue of those holding power within those institutions. Ideas grounded in one's religious identity support and nurture this virtue and should, therefore, always be permitted within the marketplace of ideas and the policymaking process.

The *Lemon* test precludes great ideas grounded in one's religious identity from entering the policymaking process. People of faith should not be stripped of their dignity, religious identity, and conscience in order to serve in our constitutional republic. That certainly was not the Framers' vision.

In summary, judicial crafting of a subjective three-prong "secular purpose" test defining the Establishment Clause: 1) exceeds the scope of Article III; 2) bypasses constitutionally required politically accountable processes for amending a constitutional rule of law; 3) undercuts the legitimacy of the judicial power; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous U.S. citizens. This Court should, therefore, overrule *Lemon* and no longer apply its "secular purpose" test to government action.

CONCLUSION

Because the President's Proclamation was not a law establishing a national religion, the Proclamation did not violate the Establishment Clause of the First Amendment. This Honorable Court should, therefore, reverse the decision of the appellate court.

Respectfully submitted,

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